

APPEAL NO. 010861

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 27, 2001. The hearing officer determined that the respondent (claimant) was not entitled to supplemental income benefits (SIBs) for the first through fifth quarters, but that the appellant (carrier) had waived the right to contest claimant's entitlement to SIBs for the first through fifth quarters by failing to timely request a benefit review conference (BRC). The hearing officer ordered the carrier to pay benefits accordingly. The carrier has appealed the adverse determinations of the hearing officer, on grounds which will be discussed below. The claimant has responded to the appeal, and urges that the decision of the hearing officer be affirmed.

DECISION

Affirmed, with modifications of Conclusions of Law Nos. 2, 3, 4, 5, and 6, and the Decision of the hearing officer.

This case has had a long history which is summarized in our previous opinions. Texas Workers' Compensation Commission Appeal No. 961090, decided July 22, 1996; Texas Workers' Compensation Commission Appeal No. 972212, decided December 12, 1997 (unpublished); and Texas Worker's Compensation Commission Appeal No. 001733, decided September 13, 2000. In Appeal No. 001733, we rendered a decision that the claimant's maximum medical improvement (MMI) date was previously determined to be December 23, 1996, in Appeal No. 972212, and affirmed the hearing officer's decision to appoint a second designated doctor to determine the claimant's impairment rating (IR) because the first designated doctor had refused to rate the claimant's entire compensable injury. The second designated doctor submitted a Report of Medical Evaluation (TWCC-69) dated August 17, 2000, with a "statutory" MMI date of December 24, 1996, and an IR of 25%. On September 21, 2000, the Texas Workers' Compensation Commission (Commission) issued a Notice of Entitlement to [SIBs] for Quarter #1, which lists the date of MMI as December 24, 1996 (which was erroneous by one day, see Appeal No. 972212 and Appeal No. 001733), and the IR as 25%. Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), the Commission letter was deemed received by the carrier five days after the date mailed, or September 26, 2000. Rule 130.103(b) provides:

If the Commission determines that the injured employee is entitled to [SIBs] for the first quarter, the notice of determination shall include:

- (1) the beginning and end dates of the first quarter;
- (2) the amount of the monthly payments;
- (3) the amount of the wages used to calculate the monthly payment;

(4) instructions for the parties of the procedures for contesting the commission's determination as provided by §130.108 of this title (relating to Contesting Entitlement or Amount of [SIBs]; Attorney Fees); and

(5) an Application for [SIBs], filing instructions, a filing schedule, and a description of the consequences of failing to timely file.

The date of MMI of December 24, 1996, was not correctly stated in the notice, as it did not conform to our decision in Appeal Panel No. 001733, and this apparently led to the beginning and end dates of the first quarter being set forth incorrectly in the notice. The dates for the first quarter are listed as June 3, 1998, through September 1, 1998, but the first quarter actually began on June 2, 1998, and ended on August 31, 1998, as stipulated by the parties at the CCH.

In its appeal of this case, the carrier notes that Appeal Panel No. 001733 has been taken to judicial review on the issue of whether it was appropriate to appoint a second designated doctor and whether the first designated doctor had in fact refused to rate the claimant's cervical spine. The carrier takes the position that the issue of the validity of the second designated doctor's appointment must be resolved before there can be a final determination of the IR. The carrier next argues that the Commission's initial determination of entitlement to SIBs is not valid because it was based on the incorrect date of MMI. Citing Question/Resolution Log (QRL) 96-14 (Claimant's Exhibit No.12) as authority, the carrier urges that when the dates of an initial determination of SIBs are incorrect, the proper procedure would be for the Commission to issue a new initial determination using the correct dates. The carrier next argues that the hearing officer erred in finding that the carrier waived its right to contest SIBs entitlement for the first through fifth quarters because there was no proper initial determination (for the same reasons advanced above). Lastly, the carrier argues that under Section 408.146(c), because the claimant was not entitled to SIBs for 12 consecutive months, the claimant ceases to be entitled to any additional income benefits for the compensable injury. The carrier argues that "equity" requires application of the "four quarters rule" to "limit the punishment of the carrier for its failure to timely dispute entitlement" to SIBs.

We reject the carrier's first argument that there is no valid IR because of pending judicial review. Section 410.205 provides that "...the decision of ... appeals panel regarding benefits is binding during the pendency of an appeal under Subchapter F or G." See *also* Texas Workers' Compensation Commission Appeal No. 960368, decided April 8, 1996, and Texas Workers' Compensation Commission Appeal No. 960941, decided May 22, 1996.

In its second attack on the Commission's determination that the claimant is entitled to first quarter SIBs, the carrier takes the position that the Commission's determination was invalid because it erroneously set forth the beginning and end dates of the first quarter, based on the incorrect MMI date. The carrier would invalidate that initial determination

because the beginning date was off by one day. The carrier cites QRL 96-14 for the proposition that, since this was an invalid initial determination, the fairest approach would be to have the Commission reissue the initial determination. This would, of course, allow the carrier an opportunity to gain relief from the effects of Rule 130.108(c), which provides that “a carrier waives the right to contest the Commission’s determination of entitlement to, or amount of, [SIBs] for the first quarter if the request is not received by the Commission within 10 days after the date the insurance carrier received the determination.” The carrier’s argument that it should get relief based on the erroneous date misses the purpose and intent of the notice requirement. Notice of a determination by the Commission that the claimant was entitled to SIBs for the first quarter was effectively provided by the Commission letter of September 21, 2000. As we said in Texas Workers’ Compensation Commission Appeal No. 950275, decided March 28, 1995, discussing a SIBs application which contained incomplete information:

Section 408.147(b) and Rule 130.108(c) provide no exception for substantive defects that are arguably inherent in the Statement of Employment Status [previous version of the SIBs application form]. The carrier is required to react to the receipt of the document; we believe that the fact that the document is arguably incomplete does not preclude a waiver if the 10-day requirement for requesting a BRC is not met, because such matters of substance are exactly among the matters that should be raised in the requested BRC.

It was incumbent upon the carrier to react to the notice, and it may not now complain that an erroneous detail makes the notice defective. Ignoring a notice from the Commission is not a viable option. Further, the carrier’s reliance on QRL 96-14 is misplaced; the situation discussed there is significantly different than the situation in this case. The claimant in that case had an initial IR of 15%. The IR was disputed and impairment income benefits were paid out before the designated doctor was appointed. The Commission made an initial determination of SIBs eligibility, and SIBs were actually paid for the first quarter. The designated doctor later assigned a 33% IR, and the QRL was that the Commission’s initial determination was invalid because it was “without the benefit of the information from the current filing period.” That resolution was appropriate because the significant period of time before SIBs would start with the higher IR would have a substantial bearing on whether the information provided was “current.” In the present case, a difference of one day would not change “the information from the current filing period.” Indeed, the discrepancy in the dates would have been a matter which the carrier could have disputed by requesting a BRC, in accordance with Rule 130.108(c) and Rule 141.1. We hold that the carrier has waived its right to contest the Commission’s determination of entitlement to first quarter SIBs by failing to request a BRC within 10 days of receiving the determination, and we affirm the hearing officer’s decision. Section 408.147(b) and Rule 130.108(c) and (d).

The carrier’s assertion that Section 408.146(c) limits the carrier’s liability to four quarters of SIBs payments in this case presents an interesting question. We note first that the carrier has not made us aware of any authority for its proposition that Section

408.146(c) should still apply when a claimant prevails on SIBs payments only because the carrier has waived its right to dispute entitlement to SIBs. After extensive research, we have found one case where we dealt with an issue that is very close to the issue in this case. See Texas Workers' Compensation Commission Appeal No. 990849, decided May 26, 1999, where a claimant had two separate injuries each of which each resulted in IRs of 15% or more. That claimant received SIBs for her first injury and applied for SIBs for the second injury, even though she knew that she could not receive SIBs for the second injury as long as she was receiving SIBs for the first injury. The carrier denied SIBs applications for the second, third, and fourth quarters because the claimant was receiving SIBs for the first injury. When the fifth quarter application was filed, the carrier denied payment "because 4 quarters expired in which SIBs were not paid." The carrier did not request a BRC to dispute any of the claimant's SIBs applications, arguing at the CCH that "it would be a waste of time for all concerned to require a Carrier that is not required to make SIBs payments to file a 'dispute.'" We found no such exception in the 1989 Act or Commission rules. We found waiver of the carrier's right to contest entitlement under Section 408.147(b) and Rule 130.108(c) and held that the claimant was "entitled" to SIBs because the carrier waived the right to contest entitlement by failing to request a BRC within the required time period. We also reversed the hearing officer's determination that the claimant permanently lost entitlement to SIBs because she was not "entitled" for four consecutive quarters. We rendered a decision that the claimant in that case had not permanently lost entitlement to SIBs. In Appeal No. 990849, the hearing officer went on to make determinations that, during the relevant periods, the claimant had not attempted in good faith to seek employment commensurate with her ability to work. We acknowledged that those findings were supported by sufficient evidence, but stated "because carrier waived the right to contest entitlement to SIBs, as discussed previously, claimant is entitled to SIBs for those quarters. [Emphasis added.]" That claimant received no SIBs payment as a result of our ruling, but the important point is that we found "entitlement" to SIBs existed because of the carrier's waiver of its right to dispute. The instant case is analogous. The carrier in this case had the right to contest the claimant's entitlement to SIBs, but has waived the right to do so by its inaction. The claimant has thus become entitled to SIBs.

We see an additional basis for affirming the result in this case. Section 408.147(b) provides in relevant part that if a carrier fails to make a request for a BRC within 10 days, the "insurance carrier waives the right to contest entitlement to [SIBs] . . . for that period." The BRC prior to the CCH in this case reported five issues relating to SIBs for the first through fifth quarters. We believe the hearing officer could have first determined the sixth issue of carrier waiver and ruled that the other issues were not properly before the CCH, as the carrier had "waived the right to contest entitlement to SIBs for those quarters."

We recognize that the hearing officer made Conclusions of Law Nos. 2, 3, 4, 5, and 6 which state that claimant was "not entitled" to SIBs for the applicable quarters. We believe it is appropriate to correct the hearing officer's Conclusions of Law to correctly state the legal effect of the carrier's waiver of its right to contest entitlement to SIBs and do so as follows:

CONCLUSIONS OF LAW

1. Claimant is entitled to [SIBs] for the first quarter, June 2, 1998 through August 31, 1998, because the carrier waived its right to contest entitlement.
2. Claimant is entitled to [SIBs] for the second quarter, September 1, 1998 through November 30, 1998, because the carrier waived its right to contest entitlement.
3. Claimant is entitled to [SIBs] for the third quarter, December 1, 1998 through March 1, 1999, because the carrier waived its right to contest entitlement.
4. Claimant is entitled to [SIBs] for the fourth quarter, March 2, 1999 through May 31, 1999, because the carrier waived its right to contest entitlement.
5. Claimant is entitled to [SIBs] for the fifth quarter, June 1, 1999 through August 30, 1999, because the carrier waived its right to contest entitlement.

We also modify the hearing officer's Decision paragraph by changing the first sentence to read as follows:

Claimant is entitled to [SIBs] for the first through fifth quarters.

The balance of the decision paragraph is correct and is affirmed as written.

We are mindful of the points raised in the dissent about Section 408.146(c), but believe that waiver by the carrier trumps that provision. Just as an injury which might otherwise not be compensable becomes compensable when the carrier fails to timely contest compensability, this claimant became "entitled" to SIBs as a result of the carrier's failure to contest entitlement to SIBs. It would be an anomaly to hold that inaction by the carrier will still result in application of a rule that amounts to imposition of a "death penalty" on the claimant's benefits, when the Supreme Court has said "we liberally construe workers' compensation legislation to carry out its evident purpose of compensating injured workers." See, for example, Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999).

The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to the evidence. (Section 410.165(a)). It is for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

For the foregoing reasons, we affirm the Conclusions of Law and Decision, as modified, and the Order of the hearing officer.

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Concurring and Dissenting Opinion:

I concur in the result insofar as it determines that the carrier is liable to the claimant for the payment of supplemental income benefits (SIBs) for the first four quarters because the effect of the carrier's waiver of its right to contest the claimant's entitlement to SIBs for those quarters resulted in the carrier's liability for such payments. I dissent from the majority's decision insofar as it determines that the carrier is liable for payment of SIBs for the fifth quarter because the claimant was found by the hearing officer not to be entitled to SIBs for the first four quarters and therefore lost his entitlement to all future SIBs pursuant to Section 408.146(c).

Section 408.142(a) provides that an employer is "entitled" to SIBs "if" the employee satisfies the four stated statutory requirements. In my view, the obverse is true, to wit: if the four statutory elements are not met, the employee is not "entitled" to SIBs. Based on the evidence and considering the statutory requirements for entitlement to SIBs, the hearing officer found that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work during the qualifying periods for the first five quarters. Based on those findings, the hearing officer concluded that the claimant is not entitled to SIBs for the first five quarters. The hearing officer further found that the carrier failed to timely file its disputes of entitlement for the first five quarters and concluded that the carrier had waived its right to contest the claimant's entitlement to SIBs for those quarters. Based on those findings and conclusions the hearing officer's Decision states that the claimant is not entitled to SIBs for the first five quarters and that because of its waivers, the carrier is liable to the claimant for payment of SIBs for those quarters.

In my opinion, the effect of the waivers was not to establish that the claimant was entitled to SIBs but rather to establish that the carrier is liable for their payment. The hearing officer determined on the merits of the evidence and the statutory requirements that the claimant is not entitled to SIBs for the first four quarters notwithstanding that she also

determined that the carrier is liable for their payment because of the waivers. Accordingly, the claimant has been determined to be not entitled to SIBs for the first four quarters and Section 408.146(c) provides that he has lost entitlement to all future SIBs after the first four quarters. The case relied on by the majority, Texas Workers' Compensation Commission Appeal No. 990849, decided May 27, 1999 is inapposite because it involved overlapping SIBs periods from two injuries.

Philip F. O'Neill
Appeals Judge